

No. 15,508

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES E. TOLIVER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

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Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Findings of fact and conclusions of law of the court	1
Argument	7

Table of Authorities Cited

Cases

Pages

Charles E. Toliver v. United States (9th Cir.), 224 F.2d 742	5, 6, 7
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Statutes

21 United States Code, Section 174	6
26 United States Code, Section 2553	6
28 United States Code, Section 1291	1
28 United States Code, Section 2255	1, 7

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JURISDICTION.

Jurisdiction is invoked under Section 1291 and 2255, Title 28 United States Code.

STATEMENT OF THE CASE.

Findings of Fact and Conclusions of Law of the Court:

Charles E. Toliver has filed a motion under Section 2255 of Title 28 United States Code alleging that his sentence is illegal. On December 6, 1956 a hearing was held in which Toliver was represented by counsel and the United States by the United States At-

torney. The cause being submitted on the motion, files and records of the case, the Court having considered the same, and heard arguments of counsel, and being fully advised makes the following:

FINDINGS OF FACT.

I.

That Toliver was charged in the first count of the indictment as follows:

“The Grand Jury charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 7th day of March, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin.”

II.

That Toliver was charged in the third count of the indictment as follows:

“The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 18th day of January, 1952, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distrib-

ute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin."

III.

That Toliver was charged in the fourth count of the indictment as follows:

"The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the third count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew."

IV.

That Toliver was charged in the fifth count of the indictment as follows:

"The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, and Abe Brown named herein as co-conspirator but not as a defendant, did conspire together and with diverse other persons, whose names are to said Grand Jury unknown,

to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendant then and there well knew, in violation of Section 174 of Title 21 United States Code, and thereafter and during the existence of said conspiracy the said defendant, in the Southern Division of the Northern District of California, did the following acts in furtherance of and to effect the objects of the conspiracy aforesaid.

Overt Acts

“1. On March 7, 1953 in the vicinity of 7th and Center Streets, at Oakland, California, defendant Charles E. Toliver, alias Little Snooks, and co-conspirator Abe Brown had a conversation.

“2. On March 11, 1953, at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards.”

V.

That on March 8, 1956 count two of the indictment was dismissed on the motion of petitioner's counsel. A jury trial was held on March 8 and 9, 1956 before Judge O. D. Hamlin. On March 9, 1956 the jury returned a verdict of guilty on counts one, three, four

and five of the indictment and sentence was pronounced on March 12, 1956 by Judge O. D. Hamlin.

VI.

That the petitioner was sentenced to be imprisoned for four years on count one and to be imprisoned for four years on count three, said term of imprisonment imposed on count three to run concurrently with that imposed on count one; and be imprisoned for four years on count four, said term of imprisonment imposed on count four to commence and run from and after the expiration of the term of imprisonment imposed on counts one and three, and be imprisoned for four years on count five, said term of imprisonment to run concurrently with the term of imprisonment imposed on count four and to commence and run from and after the expiration of the term of imprisonment imposed on counts one and three. The petitioner was sentenced to pay a fine of \$1.00 on each of counts one, three, four and five.

VII.

That Toliver appealed from the judgment of conviction in the instant case and the judgment was affirmed in the case of *Charles E. Toliver v. United States* (9th Cir.), 224 F.2d 742.

VIII.

That Toliver contends that the Court lacked jurisdiction to impose consecutive sentence on counts three and four, since the evidence in support thereof involved the same narcotic transaction.

IX.

That Toliver contends that the Court lacked jurisdiction to impose consecutive sentences on counts one and five since the evidence in support of count five, the conspiracy count of the indictment, also supported count one, a substantive violation.

CONCLUSIONS OF LAW.

I.

The motion, files and records of the case conclusively show that the prisoner is entitled to no relief.

II.

Consecutive sentences can be imposed for a violation of the Harrison Narcotic Act, Title 26 U.S.C. §2553, sale of narcotics, and violation of the Jones-Miller Act, Title 21 U.S.C. §174, concealment of narcotics, even though the evidence shows but one transaction was involved.

III.

Consecutive sentences may be imposed for a substantive offense and for a conspiracy to commit it.

IV.

The issues urged by petitioner were decided adversely to him by the Court of Appeals for the Ninth Circuit in his appeal from the judgment of conviction, *Toliver v. United States*, supra.

ARGUMENT.

Appellant in his Section 2255 motion has made the same contentions that were decided adversely to him in his appeal.

This case is, therefore, governed by the case of *Charles E. Toliver v. United States* (9th Cir.), 224 F.2d 742, and the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 15, 1957.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

